79-1546

Supreme Court, U. S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

MELANIE M. LAYFIELD,

Petitioner

versus

BILL HEARD CHEVROLET CO. and
GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents

APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RON S. IDDINS
Attorney for Petitioner
P.O. Box 503
Columbus, Georgia 31902

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SUPREME COURT
OF THE UNITED STATES

MELANIE M. LAYFIELD,

Petitioner

versus

BILL HEARD CHEVROLET COMPANY and GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In accordance with Rule 23 of the Rules of the Supreme Court of the United States the following information is supplied.

a)

The official report of the opinion delivered in the Fifth Circuit is 607 F.2d 1097 (5th Cir. 1979), and a copy of the opinion is appended to this petition.

b)

The jurisdiction of the Court is invoked by the provisions of 28 U.S.C. §1254(1). The date of the judgment sought to be reviewed is December 3, 1979, entered the same date. A Petition for Rehearing was filed but was denied on January 7, 1980. An extension of the stay until March 20, 1980, was dated and entered on February 21, 1980.

c)

The questions presented for review are as follows:

1) Can an amendment to a complaint be denied without the trial court abusing its discretion if there is no prejudice to the opposing party?

2) Can a grant of summary judgment to defendants be upheld when it was not shown that a "doc fee" was retained entirely by the seller and not shared with other parties? If so, how can such a decision be consistent with Abbey v. Columbus Dodge, Inc., 607 F.2d 85 (5th Cir. 1979), which found a truth in lending violation when the fee was shared between seller and financer?

d)

The facts material to the consideration of the questions presented are set forth hereinafter as they pertain to the two questions presented, respectively.

1) AMENDMENT ISSUE

The Petitioner filed a truth in lending action pursuant to the Truth in Lending Act, 15 U.S.C. §1601 et seq., in the trial court on December 12, 1977. The Respondents were both served on January 3, 1978. Three weeks after answers were filed, the Petitioner filed an amendment but failed to request leave of court, Fed. R. Civ. P. 15(a). On February 24, 1978, nine (9) days after the amendment, the Respondent, BILL HEARD, objected to allowance of the amendment due to Petitioner's failure to get leave of court and, at the same time, moved for summary

judgment.

On March 6, 1978, ten (10) days later, the Petitioner filed a motion for leave to amend her complaint. One week thereafter, the other Respondent, GMAC, moved for summary judgment. On March 17, 1978, BILL HEARD moved to dismiss Petitioner's second amendment. On April 5, 1978, ninety-two (92) days after the Respondents were served, the court entered summary judgment for Respondents and denied the Petitioner's amendment.

The Order of the trial court relating to the amendment said the "defendants have filed their objections" and "the defendants' objections are valid" (R-94). Only BILL HEARD filed any objection; GMAC has never resisted the amendments of the Petitioner. The Motion (R-84) and brief (R-85-93) of BILL HEARD posed the following "objections" which the trial court sustained.

First, that the amendment failed to state a claim, and, second, that the trial court had no jurisdiction of one count of the amendment. The brief said that the cause of action was asserted, that all relevant facts were apparent prior to the filing of the original complaint, and, finally, that the allowance of the amendment would "prejudice" BILL HEARD because a compromise settlement offer had been made.

The motion and brief did not raise any objection to Petitioner's failure to file a supporting brief or affidavits with her motion for leave to amend as set forth in the local rules of the court. Nor did they raise an objection that the amendment was late because BILL HEARD (but not GMAC) had filed a motion for summary judgment. The

Order of the trial court could not have embraced these objections since they were not raised when the Respondents "filed their objections to these proposed amendments".

Petitioner's brief in the Fifth Circuit argued that no prejudice had accrued to the Respondents as a result of the proposed amendment, and this, combined with the liberal policy relating to granting amendments so that controversies should be decided on the merits and not on technicalities of pleading, required reversal of the Order of the District Court.

Respondents' brief, filed July 31, 1978, argued that they were prejudiced, but only because a compromise offer had been made and refused prior to the tendering of the amendment. The brief sought to distinguish prior Fifth Circuit precedent in the case of Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961), on the basis that Petitioner knew all facts before commencing her action and that the trial court gave sufficient reasons for denying the amendment. For the first time, Respondents alleged Petitioner had violated local rules of the district court in failing to support her motion to amend with a brief or affidavits. No support for this argument was in the record and no authority was cited to the court in the brief.

On September 7, 1979, the Respondents submitted a letter brief to the appellate court citing Lamar v. American Finance System of Fulton County, Inc., 577 F.2d 953 (5th Cir. 1978), and Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503 (9th Cir. 1978), the two cases relied on by the court in its opinion located at 607 F.2d 1097 (5th Cir.

1979).

The court referred to three things regarding the amendment in affirming the trial court. 1) A motion for summary judgment was outstanding on behalf of one Respondent. 2) All relevant facts were known to Petitioner prior to filing the complaint. 3) The Petitioner violated a local rule in failing to file a brief with her motion.

The Fifth Circuit expressed concern over poor preparation of pleadings by counsel for Petitioner, necessitating preparation of an amendment. This was part of the rationale used in the "all facts were known" argument of Respondents.

The court never mentioned the word "prejudice" in its opinion and never implied that the Respondents would have been prejudiced in any way if the amendment of Petitioner were allowed.

2) SUMMARY JUDGMENT ISSUE

Petitioner's original complaint alleged a truth in lending violation due to the inclusion of a $16.00 "documentary fee" charge in the "other charges" section of the disclosure statement rather than the "finance charge". This was the basis for federal jurisdiction in the court of first instance since a "federal question" was presented.

Respondent BILL HEARD moved for summary judgment based on an employee's affidavit (R-41-43) stating that the "Doc Fee $16.00" was not paid to any "governmental agency or offical". The affidavit, however, did not

state that the fee was retained entirely by the seller, Fed. Reserve Bd. Letter #623.

Respondent GMAC later filed a motion for summary judgment and attached its employee's affidavit to the effect that "[i]t is further GMAC's understanding that at the time it purchased Plaintiff's contract from BILL HEARD, the entire documentary fee charge [sic] to the retail customer is retained by the dealer as compensation for such services" (R-79).

The Petitioner conceded in the appellate court that the charge would be properly disclosed if the charge was entirely retained by the seller. But, that was never proven and the grant of summary judgment was improper since all possible violations had not been precluded.

The case of Abbey v. Columbus Dodge, Inc., 607 F.2d 85 (5th Cir. 1979), held it a truth in lending violation if seller does not retain the entire fee. This factual matter was not proven by the Respondents and no summary judgment in their favor should have been granted.

e) ARGUMENT

I. THE DENIAL OF AN AMENDMENT MUST BE SUPPORTED BY A SHOWING OF PREJUDICE TO THE OPPOSING PARTIES. IT IS AN ABUSE OF DISCRETION FOR A TRIAL COURT TO DENY AN AMENDMENT IF NO HARM RESULTS TO THE OPPOSING PARTIES.

The case of United States v. Hougham, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960), enunciated the standard for amendments when it said "[t]he applicable rule is Rule 15 of the Federal Rules of Civil Procedure,

which was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result".

This is not an errant view but one derived from other Supreme Court precedents, Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), holding that "pleading is [not] a game of skill in which one misstep by counsel may be decisive to the outcome," p. 48, and Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), wherein an amendment filed after the complaint was dismissed held that the mandate of Rule 15(a) that leave to amend "shall be freely given" was one to be heeded. Foman said that without a justifying reason by the court, refusal to allow the amendment constituted abuse of discretion. See Moore's Federal Practice, 2d ed., ¶15.08[2] (cited by Foman court).

The Fifth Circuit had no previous trouble applying these holdings to cases before it. Lone Star Motor Import, Inc., v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961), involved an amendment offered after the trial court granted a motion to quash the summons. The trial court dismissed the amendment without explanation. The Fifth Circuit said that the perfunctory challenge that the amendment "comes late" was not sufficient to show prejudice. "We can see no such prejudice. On the other hand, we see much prejudice, perhaps irreparable, if leave is not granted," p. 75.

In Griggs v. Hinds Junior College, 563 F.2d 179 (5th Cir. 1977), no undue prejudice to opposing party was found and amendment was ordered allowed by the court.

Where was the prejudice to the Respondents? The brief of BILL HEARD in the trial court is the only source to look for "prejudice" since the Order of the trial court never identified any reason for denying the amendment (in itself reason enough to run afoul of Lone Star and Griggs, supra). The brief said the Respondent was prejudiced because of a compromise settlement offer that Petitioner had refused prior to amending. BILL HEARD contended, as well, that all facts were known before hand and the amendment should be denied for that reason. This latter reasoning was followed by the appellate court, but never has it been asserted by the Respondent or the court that prejudice to the Respondents existed as a result of the tendered amendment.

Again, in its brief the Respondents identified the settlement offer as the only showing of "prejudice", pp. 5-7. The Fifth Circuit apparently was not convinced on the point since no mention of that contention appears in its opinion. As a result, the opinion points to no prejudice to the Respondents at all. This is inconsistent with the cited opinions of this Court and prior decisions of the appellate court which require a showing of prejudice to the opposing parties.

The reasoning of the court was based on three cases. First, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), for the proposition that allowance of an amendment is discretionary. The case stands for other holdings as well, however, including "in deciding whether to permit such an amendment the trial court was required to take into account any prejudice that Zenith would have suffered as a result . . . and here the prejudice to Zenith would have been

substantial," (emphasis added), pp. 330-331. The proposed amendment was held to be waived due to undue delay in filing it more than one year after preliminary findings made by trial court in an anti-trust case. The Fifth Circuit ignored this restatement of the requirement of a showing of prejudice to justify denying an amendment.

The second case was Lamar v. American Finance System of Fulton County, Inc., 577 F.2d 953 (5th Cir. 1978), involving an amendment offered after motions for summary judgment by both parties. This is the only case that supports the lower court's opinion in this case since it also fails to mention prejudice as part of the required reasoning for denying an amendment. Oddly, it cited Zenith Radio Corp., supra, which used "substantial prejudice" as the reason for disallowance of the amendment, and Dunn v. Koehring Co., 546 F.2d 1193 (5th Cir. 1977), which involved an amendment submitted the morning of the trial raising an affirmative defense after the case had been filed for five years and discovery had been completed for four years.

Lamar had no reason to dispense with the requisite showing of "prejudice". The court concentrated on what it felt was the proper preparation of a case and the need to frame pleadings correctly to eliminate additional pleadings in the form of amendments. The appellate court in this case followed suit and held that when all facts are known, an amendment can be properly denied. Apparently regardless of prejudice. And of the mandate of the rules that amendments "shall be freely granted". Compare Howey v. United States, 481 F.2d 1187 (9th Cir. 1973), stating that even though a five-year delay which was unexcused took place, absent

prejudice, the amendment must be granted since while several criteria are employed to determine the propriety of a motion for leave to amend, "the crucial factor is the resulting prejudice to the opposing party".

Since Lamar, supra, involved summary judgments, the reported opinion mentions that Petitioner's motion to amend was filed after a summary judgment motion was filed. Only one Respondent had filed a summary judgment motion at the time of Petitioner's second amendment and neither had filed when Petitioner filed her first amendment which was improper due to failure to request leave of court. Since many cases involve amendments after dismissals and judgments, see Foman v. Davis and Lone Star Motor Import, supra, the court never held that the pendancy of the motion affected the amendment's validity nor that the court could not have considered the amendment and ruled as quickly if the amendment had been granted.

Finally, the lower court cited Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503, (9th Cir. 1978), for the proposition that failure to abide by local rules of the district court regarding filing of briefs and affidavits with motions "could" authorize the court's denial of the amendment. The trial court's order, however, recited that the denial of the amendment was based on the objections filed in the Respondent's brief in the trial court. BILL HEARD never argued or mentioned the failure to file a brief in the trial court. The local rule was never included in the record on appeal. The first mention of the local rules is found in Respondents' brief to the appellate court filed three (3) months after entry of the Order. The first time the rule was

reproduced for the court to see was in Respondents' letter dated September 7, 1979, to the Clerk of the Fifth Circuit.

It is clear that the local rule argument was not part of the trial court's ruling, and its use by the circuit court is a pretext and not a valid reason to uphold the denial of the amendment. Aside from that, the Waters case involved the denial of an amendment without prejudice for failure to follow the local rules which required the amendment to be included with the motion, presumably so that the court could determine what the amendment said. A second amendment was denied because it was prejudicial to defendants and involved litigating an issue previously conceded. The amendment was also filed sixteen (16) months after the close of discovery. As such, the court held that both "undue delay and obvious prejudice" (p. 507) existed and the amendment was properly denied.

In this case Petitioner's failure to comply with the local rules was so minor neither court nor opposing counsel noticed it. In the appellate brief Respondents mentioned it but did not argue it. Only after Waters, supra, was decided did the fact acquire significance. Nevertheless, no showing of prejudice has yet been made by Respondents and the court improperly went astray when it ignored prior decisions on the matter.

Other circuit courts have also established precedents pursuant to the holdings of this Court. In Cornell and Company, Inc. v. Occupational Safety and Health Review Commission, 573 F.2d 820 (3rd Cir. 1978), it was stated that "[i]t is well-settled that prejudice to the non-moving party is

the touchstone for the denial of an amendment" (p. 823, citing Zenith Radio Corp., supra). Buck v. Aquaslide 'N' Dive Corp., 562 F.2d 537 (8th Cir. 1977), held that "prejudice must be shown" (p. 540) and "[t]he burden is on the party opposing the amendment to show such prejudice".

The trial court had one allegation of "prejudice" before it, and only one. That was the compromise offer made to Petitioner. This issue was ignored by the Fifth Circuit, and rightfully so. The fact that the trial court failed to identify any reason for denying the amendment left the door open to allege a violation of local rules after the fact by Respondents. The fact is, however, that the requirement of prejudice is clearly set forth in the precedent of this Court, other circuit courts and even in the Fifth Circuit, and no prejudice existed to uphold the trial court's order or the appellate court's opinion. In the absence of this required factor, the amendment must be allowed.

II. THE AFFIRMANCE OF SUMMARY JUDGMENT IN RESPONDENTS' BEHALF CONFLICTS WITH A PRIOR DECISION OF THE APPELLATE COURT. THE PRIOR DECISION REVEALS THAT RESPONDENTS WERE NOT ENTITLED TO AN AWARD OF SUMMARY JUDGMENT SINCE THEY FAILED TO PROVE EVERY ELEMENT OF THEIR CASE.

It is settled that every aspect of a case must be proven in order for summary judgment to lie, and the facts must be construed most strongly in favor of the non-moving party. If any factual element fails in its proof, summary judgment is improper, Lloyd v. Lawrence, 472 F.2d 313 (5th Cir. 1973).

The Respondents charged a "Doc Fee

$16.00" in their contract. It was never proven that the entire sum was retained by the seller, BILL HEARD.

The recently decided case of Abbey v. Columbus Dodge, Inc., 607 F.2d 85 (5th Cir. 1979), states that the failure to include a "filing fee" (identified by Columbus Dodge as a documentary preparation fee) within the finance charge was a truth in lending violation where part of the fee was retained by the seller and part was sent to a bank.

The case of Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976), reproduced in footnote 18 Fed. Reserve Bd. Letter No. 623 which stated a "documentary or make-ready fee" could be disclosed as an "other charge" if the sum were "retained entirely by the dealer" (emphasis added). Abbey, supra, has embodied this requirement in the opinion proper rather than the footnotes.

The lower court rejected Petitioner's contention regarding Meyers, supra, but has run into conflict with the Abbey case as a result. As pointed out in the material facts portion of this petition, the Respondents have never proven that BILL HEARD exclusively retained the "doc fee" in question.

The Fifth Circuit misread Meyers, supra, and issued an opinion in open conflict with Abbey, supra. This Court must resolve this inconsistent result by holding that no summary judgment was due the Respondents.

f) CONCLUSION

Absent some element of prejudice to

the opposing parties, the refusal to allow an amendment is an abuse of discretion which flies in the face of the spirit of the Rules of Civil Procedure and clearly established precedents of this Court and the Fifth Circuit.

Failure to follow local rules was a contrived justification of the trial court's action and not part of the consideration of the court when the order was entered. The court's refusal was completely nonspecific and lent itself to later accommodation to any objection that occurred to Respondents. Reference to BILL HEARD's original brief in the trial court puts the lie to the contention that local rules had anything to do with the trial court's order.

Knowledge of facts by Petitioner and filing of an amendment after Respondent filed a motion for summary judgment do not of themselves constitute prejudice. If amendments can be easily denied without a showing of prejudice, technical pleading is substituted for notice pleading, the liberal policy of granting amendments is replaced by a conservative approach that undercuts the whole spirit of the Rules and ignores the "mandate to be heeded" to grant amendments in the interest of deciding cases on the merits.

On the issue of summary judgment the Fifth Circuit affirmed the trial court when it was apparent even to the appellate court that no proof existed on the matter of whether the "doc fee" was kept in its entirety by the seller. Fortunately, the Abbey v. Columbus Dodge, Inc., case, supra, holds the failure to keep the fee by the seller a violation of disclosure requirements. This petition should be granted and full and

proper consideration given this matter by granting the issuance of a writ of certiorari to the Fifth Circuit.

Respectfully submitted,

RON S. IDDINS
Attorney for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that I have this 13th day of March, 1980, served Respondents by mailing three (3) copies of the foregoing petition to Jerry A. Buchanan, P.O. Box 2707, Columbus, Georgia 31902, and Ernest Kirk, II, P.O. Box 2648, Columbus, Georgia 31902, attorneys of record for Respondents.

RON S. IDDINS

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 78-2034

MELANIE M. LAYFIELD,
Plaintiff-Appellant,

v.

BILL HEARD CHEVROLET CO. and
GENERAL MOTORS ACCEPTANCE CORP.,
Defendants-Appellees

Decided December 3, 1979

Appeal from the United States District Court for the Middle District of Georgia.

Before COLEMAN, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

Melanie M. Layfield appeals from orders of the United States District Court for the Middle District of Georgia denying her leave to amend her complaint and entering summary judgment against her on the counts contained in her original complaint. We affirm.

The appellant Layfield entered into a retail installment contract with Bill Heard Chevrolet Co. for the purchase of an automobile. On December 12, 1977, she filed a complaint in the district court alleging two violations of the Truth-in-Lending Act,

15 U.S.C.A. §1601 et seq. Count One complained of the disclosure of a $3.00 "state inspection" fee, and Count Two challenged the disclosure of a $16.00 "documentary fee." The complaint was served upon both Bill Heard Chevrolet Co. and General Motors Acceptance Corporation (hereinafter referred to as "Bill Heard" and "GMAC").

On February 15, 1978, the appellant filed an "amendment" to her complaint, alleging violations of the Motor Vehicle Information and Cost Savings Act of 1972, 15 U.S.C.A. §1981 et seq., which requires written disclosure of odometer readings. In its answer, Bill Heard objected to the filing of the amendment without leave of court.

On March 6, 1978, after Bill Heard filed a motion for summary judgment, the appellant moved the court for leave to amend her complaint. Her proposed amendment contained two new counts in addition to the odometer violation previously asserted. One count alleged an additional truth-in-lending violation and the other purported infractions of Ga. Code Ann. 96-1003(e). The appellant filed no briefs or affidavits in support of her motion. On April 5, 1978, the district court entered orders denying leave to amend the complaint and granting summary judgment in favor of the appellees.

The appellant's first contention on appeal is that the district court erred in denying her motion for leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice so requires." However, leave to amend is by no means automatic. The decision to grant or to deny leave to amend is within the discretion of the trial court. Zenith Radio Corp. v.

Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Under the circumstances presented here, we find no abuse of discretion in the district court's denial of the appellant's motion.

In Lamar v. American Finance System of Fulton County, Inc., 577 F.2d 953 (5th Cir. 1978), this court held that "[w]hether a litigant should be permitted belatedly to tender an entirely new issue, never even suggested before, lies in the sound discretion of the trial court." 577 F.2d at 955. We affirmed the decision of the district court to disallow the introduction of a new issue when it was raised for the first time after both sides had made motions for summary judgment. One of our main concerns in that case was the duty of an attorney to prepare a case properly and to give the issues full consideration before preparing pleadings. We believe that the reasoning used in Lamar is equally applicable to the case at hand, particularly in view of the admission by the appellant's counsel that all of the facts relevant to the proposed amendment were known to the appellant at the time she filed her original complaint.

Furthermore, when the appellant finally filed her motion for leave to amend, she failed to supply any briefs or affidavits in support thereof. A local rule of the district court requires that all written motions be accompanied by supporting briefs and affidavits. In our opinion, the district court could properly deny leave to amend for failure to comply with the local rule. See Waters v. Weyerhaeusar Mortgage Co., 582 F.2d 503 (9th Cir. 1978).

The appellant also argues that the district court erred in granting summary

judgment against her on the counts contained in her original complaint. One count alleged that the appellees had committed a truth-in-lending violation by itemizing a $15.00 "documentary fee" under the "Other Charges" section of the disclosure statement rather than including such fee in the finance charge. However, the method of disclosure used by the appellees was specifically approved by this court in Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976). Thus the district court did not err in granting summary judgment on this count.

The appellant also attacks the failure of Bill Heard to inspect the automobile after having disclosed a $3.00 charge for such service as contravening the Truth-in-Lending Act. However, this omission does not come within the scope of truth-in-lending legislation. The stated purpose of the Truth-in-Lending Act is to "avoid the uninformed use of credit" and to allow the consumer to compare the various credit terms available to him from different sources. 15 U.S.C.A. §1601. The $3.00 fee was disclosed to the appellant and she was actually charged that amount. The subsequent failure to perform the inspection was more in the nature of a breach of contract than a truth-in-lending violation. In any event, GMAC could not be responsible for the failure to inspect the vehicle. As an assignee of the contract between the appellant and Bill Heard, GMAC is liable only for violations which are apparent on the face of the assigned instrument. 15 U.S.C.A. §1614.

We conclude that the district court acted within its discretion in denying the appellant leave to amend her complaint, and that summary judgment was properly granted in favor of the appellees. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2034

D. C. Docket No. CA-77-165-COL

MELANIE M. LAYFIELD,

Plaintiff-Appellant,

versus

BILL HEARD CHEVROLET COMPANY and GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendants-Appellees.

Appeal from the
United States District Court for the
Middle District of Georgia

Before COLEMAN, KRAVITCH and HENDERSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause by, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 3, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
January 7, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-2034-MELANIE M. LAYFIELD v. BILL HEARD CHEVROLET CO., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Sally Howard
Deputy Clerk

cc: Mr. Ron S. Iddins
Mr. Jerry A. Buchanan
Mr. Ernest Kirk, II

Supreme Court, U. S.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

79-1546

IN THE
SUPREME COURT OF THE UNITED STATES

MELANIE M. LAYFIELD,

Petitioner

vs.

BILL HEARD CHEVROLET COMPANY

and

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JERRY A. BUCHANAN
Attorney for Respondent Bill Heard Chevrolet Company
P. O. Box 2707
Columbus, Georgia 31902

ERNEST KIRK, II
Attorney for Respondent
General Motors Acceptance Corporation
P. O. Box 2648
Columbus, Georgia 31902

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979, NO. 79-1546

MELANIE M. LAYFIELD, PETITIONER

VS.

BILL HEARD CHEVROLET COMPANY

AND

GENERAL MOTORS ACCEPTANCE CORPORATION,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 40 of the Rules of the Supreme Court of the United States, the following information is provided:

(a)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 607 F. 2d 1097 (5th Cir. 1979).

(b)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari, and the jurisdiction of this Court is not challenged by Respondents.

STATUTES AND REGULATIONS

This petition involves the following statutes and regulations:

1. Rule 15(a) of the Federal Rules of Civil Procedure, Fed. Rules Civ. Proc., Rule 15(a), 28 U.S.C.A., which provides as follows:

"A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend his pleadings only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders."

2. Federal Reserve Board Regulation Z, 12 CFR 226.8(c)(4), which provides as follows:

"In the case of a credit sale, in addition to the items required to be disclosed under Paragraph (b) of this section the following items, as applicable, shall be disclosed:.....(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge."

3. Rule and Order of Court dated September 2, 1960, relating to Motions and Briefs filed in the United States District Court for the Middle District of Georgia, which provides as follows:

"(a) Counsel shall submit with all written Motions a brief of authorities (and written argument if desired), and where allegations of fact are relied upon, affidavits in support thereof.

(b) Respndent's counsel desiring to submit a response, brief, or affidavits, shall submit the same within ten days after service of Movant's motion and brief.

(c) Movant's counsel shall submit any desired reply brief, argument, or affidavits within five days after service of Respondent's response, brief, or affidavits.

(d) Movant and Respondent shall serve copies of all motions, brief, affidavits (and argument if submitted) upon opposing counsel promptly, and shall file proof of such service.

(e) All motions shall be decided by the Court without a hearing unless otherwise ordered by the Court on its own motion, or in its discretion upon request of counsel.

SO ORDERED, this 2nd day of September, 1960.

/s/ T. Hoyt Davis
United States District Judge

/s/ W. A. Bootle
United States District Judge

Filed at 11:00 A.M.
JOHN P. COWART
Clerk, U. S. District Court"

QUESTIONS PRESENTED

1.

Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the trial court did not abuse its discretion in disallowing Plaintiff's/Petitioner's belated amendment to her complaint where Plaintiff/Petitioner repeatedly failed to comply with the Federal Rules of Civil Procedure and the published local rules of the United States District Court for the Middle District of Georgia, where a motion for summary judgment had already been filed and was pending with respect to Plaintiff's complaint at the time that Plaintiff filed a Motion for Leave to Amend her complaint, where the alleged facts upon which Plaintiff's purported amendment was based were well known to Plaintiff at the time her original complaint was filed, and where the grounds asserted in Plaintiff's belated Motion for Leave to Amend her complaint were admittedly false.

2.

Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the trial court's grant of Defendants'/Respondents/ Motion for Summary Judgment with respect to the Truth-in-Lending claim of Plaintiff that the documentary fee was improperly disclosed, where it was otherwise shown by Defendants through unopposed affidavits and exhibits that the documentary fee was properly itemized and disclosed as an "other charge" in accordance with the requirements of Regulation Z, Federal Reserve Board staff opinion letters, and case precedent from the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Respondents are dissatisfied with Petitioner's statement of the case, and herewith present their own statement of the case. For ease of identification, the parties to this matter will be referred to in this brief as follows: Plaintiff/Petitioner/Melanie M. Layfield will be referred to as "Layfield." Defendant/Respondent/Bill Heard Chevrolet Company will be referred to as "Bill Heard." Defendant/Respondent/General Motors Acceptance Corporation will be referred to as "GMAC."

On December 12, 1977, Layfield filed a complaint in the United States District Court for the Middle District of Georgia, Columbus Division, alleging two Truth-in-Lending violations arising out of the execution of a retail installment contract for the purchase of an automobile by Layfield from Bill Heard and financed by GMAC. Count One complained of the disclosure of a "state inspection fee" of $3.00 (this count has since been abandoned by Layfield), and Count Two complained of the disclosure of a documentary fee of $16.00.

The complaint and summons were served on both GMAC and Bill Heard on January 3, 1978. On January 23, 1978, GMAC and Bill Heard filed timely defensive pleadings and cross claims, and GMAC filed a counterclaim against Plaintiff. The counterclaim of GMAC against Plaintiff has never been answered and is in default.

On February 15, 1978, some 23 days after the defensive pleadings of both Bill Heard and GMAC were filed and served, Layfield filed with the trial court a pleading denominated "Amendment," without having first obtained leave of court to amend, without requesting or securing the consent of the opposing parties, and without filing any motion and supporting affidavits, brief of authority, or argument in support thereof. This purported "Amendment" set forth an alleged violation of the Motor Vehicle Information and Costs Savings Act of 1972, 15

USC §1981 et seq. On February 22, 1978, GMAC answered Layfield's purported "Amendment," and on February 24, 1978, Bill Heard filed an answer to Layfield's purported "Amendment," setting forth in its answer objections to the filing of the amendment without having first obtained leave of court or written consent of the adverse parties. Contemporaneously with the filing of the answer and objections to the amendment, Bill Heard filed a Motion to Dismiss the amended complaint for failure to state a claim upon which relief could be granted (Federal Rules of Civil Procedure, Rule 12(b)(6)), and for failure to obtain leave of court pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. At the same time, Bill Heard filed a motion for summary judgment against Plaintiff and filed a brief in support of both its motion to dismiss and its motion for summary judgment, together with an affidavit in support of its motion for summary judgment.

Layfield did not respond to Bill Heard's motion to dismiss, but on March 6, 1978, moved the court, for the first time, for leave to amend her complaint, on the grounds that "Plaintiff has just learned of the existence of the additional facts stated herein and justice so requires." Attached to her motion for leave to amend was a proposed "Amendment to Complaint," again setting forth allegations with reference to the Motor Vehicle Information and Costs Savings Act of 1972, supra, and setting forth two new counts, one alleging additional Truth-in-Lending violations, and another alleging violation of a Georgia state statute dealing with insurance policies. In filing her belated motion for leave to amend, Layfield again failed to comply with the local rule of the United States District Court for the Middle District of Georgia requiring a brief of authorities and affidavits in support of the factual allegations relied on in the Motion.

On March 10, 1978, Layfield filed a brief in opposition to the motion of Bill Heard for summary judgment, but did not respond, and has not yet responded, to Bill Heard's motion or brief in opposition to the allowance of the amended complaint.

On March 13, 1978, GMAC moved for summary judgment

against Layfield, and filed supporting affidavits and a brief of authority, which also incorporated the brief of Bill Heard. Layfield has never responded to GMAC's Motion for Summary Judgment or Brief in Support thereof, and Layfield has never filed any affidavits in opposition to the affidavits filed by Bill Heard and GMAC.

Finally, on March 17, 1978, Bill Heard moved the court to disallow the Plaintiff's final amendment to her complaint, and filed a brief in support of that motion. Layfield did not respond to any of the motions made to disallow her amended pleadings, nor did she ever file a brief or affidavit in support of her own motion.

On April 5, 1978, the trial judge entered an order disallowing Layfield's amendment, and also entered an order granting summary judgment in favor of both GMAC and Bill Heard as against the Plaintiff's complaint.

On April 14, 1978, Layfield filed her notice of appeal to the United States Court of Appeals for the Fifth Circuit, and on December 3, 1979, following briefing of authority and oral argument in the Fifth Circuit, that Court affirmed the orders and judgments entered by the trial court. Layfield thereafter filed a timely petition for rehearing en banc in the United States Court of Appeals for the Fifth Circuit, which was denied on January 7, 1980.

Layfield has now applied to this Honorable Court for a Writ of Certiorari, and has abandoned all issues, both substantive and procedural, raised in either the trial court or the United States Court of Appeals for the Fifth Circuit, except the procedural issue relative to the discretion of the trial court to allow or disallow the proposed amendment, and the substantive issue of the trial court's ruling that the disclosure of the documentary fee was not violative of the Federal Truth-in-Lending Act.

(f)

SUMMARY OF ARGUMENT

Since the argument of Respondents will not exceed twenty (20) pages in length, no summary of argument will be set forth.

(g)

ARGUMENT AND CITATION OF AUTHORITY

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LAYFIELD'S BELATED MOTION FOR LEAVE TO AMEND HER COMPLAINT.

Layfield's Petition for Certiorari relies upon the purported absence of prejudice to the Defendants in the trial court as the sole rationale for her argument that the trial court abused its discretion in denying her motion for leave to amend. That is to say, the Petitioner asserts that, in the absence of a showing of prejudice to the opposing parties, the denial of a motion for leave to amend is, *per se*, an abuse of discretion. This simply is not, and should not be, the law.

First, there was evidence before the trial court of prejudice to the Defendants should the amendment be allowed. The trial court had before it evidence to the effect that, subsequent to the filing of Plaintiff's complaint, but prior to the filing of any answer by the Defendants, a settlement offer was made to Layfield on behalf of Bill Heard, thus leading Layfield to believe that Bill Heard thought that there might be some possible merit to her claim as originally filed. Bill Heard, in its motion to disallow the amendment, demonstrated to the trial court that the piecemeal pleading process being employed by Layfield was not within the contemplation of the Federal Rules of Civil Procedure, and that to allow the Plaintiff to plead her case through the use of two subsequent amendments (setting forth facts and additional

claims well known to the Plaintiff when the original complaint was filed) would allow her to plead a portion of the facts, obtain a settlement offer (and thus get at least some idea of the Defendants' view of her claim), reject the proposed settlement and then file other and different claims. Sufficient prejudice was thus demonstrated to permit the trial court, in its discretion, to disallow Layfield's belated amendments, and such finding by the trial court would not have been erroneous.

Moreover, the law is clear that there can be reasons other than prejudice to the opposing party for disallowance of amendments. This Court has addressed this very issue in the case of *Foman vs. Davis*, 371 U.S. 178 (1962). There, this Honorable Court held that amendments might be disallowed for undue prejudice to the opposing party, bad faith, the futility of the amendment, where the amendment was being offered with a dilatory motive, and the like. In both the trial court and the Court of Appeals, it was shown in the opposition to the belated motion for leave to amend filed by Layfield, that the amendment was offered in bad faith, and would, in any event, be futile.

In her motion for leave to amend, Layfield asserted as the reason for her amendment that the facts set forth in the amendment were newly discovered. Yet in her brief to the Fifth Circuit Court of Appeals, Layfield admitted that there were no newly discovered facts, and that all of the information contained in her proffered amendment were known to her at the time she filed her original complaint. See *Layfield vs. Bill Heard Chevrolet Co.*, 607 F. 2d 1097, 1099 (5th Cir. 1979). Both the trial court and the appellate court were made aware of this discrepancy between the purported grounds for Layfield's motion and the true facts as they existed, thus giving a sufficient basis for the trial court to find that the amendment was offered in bad faith. Since a motion for summary judgment was already pending at the time that Layfield filed her belated motion, this would also be a sufficient basis for the trial court to find that the amendment was offered with a dilatory motive.

In addition, Respondents demonstrated to the trial court

that the amendment which Plaintiff sought to offer utterly failed to state any claims upon which relief could be granted, and that the allowance of the amendment would therefore be a futile act.

Finally, and perhaps most important, it was demonstrated to the trial court and to the Fifth Circuit Court of Appeals that Layfield, in offering her belated amendment, initially ignored the Federal Rules of Civil Procedure, requiring that leave of court be obtained before filing an amendment to a complaint, and also ignored local court rules requiring a brief of authorities and an affidavit when factual matters are being relied upon in support of the motion. Thereafter, after finally complying with the Federal Rules of Civil Procedure by filing a motion for leave to amend, Layfield continued to ignore the local court rule requiring the filing of a brief or affidavit in support of her motion. The repeated failure to comply with the local rule, was, in and of itself, sufficient reason for the appellate court to affirm the trial court's denial of Layfield's motion for leave to amend her complaint. See *Waters vs. Weyerhaeuser Mortgage Co.*, 582 F. 2d 503 (9th Cir. 1978).

A reading of Layfield's petition for certiorari shows that she has abandoned all the grounds upon which the denial of her motion for leave to amend could have been granted, save only the ground that there was no prejudice to the opposing party. Therefore, pretermitting the issue of prejudice to the opposing party, there were other grounds urged in the trial and appellate courts, any one of which provided the trial court with a sufficient basis for denying leave to amend, and those grounds were recognized by this Court in *Foman vs. Davis, supra.* Since there were other available grounds upon which the denial of leave to amend was based, Layfield has failed to show that the appellate court erred in not finding that the trial court abused it discretion in denying leave to amend. For this reason, Respondents respectfully submit that the Petition for Writ of Certiorari with respect to the issue of the trial court's refused to allow the amended pleadings be denied.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DID NOT ERR IN AFFIRMING THE

JUDGMENT OF THE TRIAL COURT GRANTING BILL HEARD'S AND GMAC'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE TRUTH-IN-LENDING ALLEGATION RELATING TO THE DISCLOSURE OF A DOCUMENTARY FEE.

Layfield argues in her petition that the decision of the United States Court of Appeals for the Fifth Circuit in the case *sub judice* conflicts with a decision of the same circuit denominated *Abbey vs. Columbus Dodge, Inc.*, 607 F. 2d 85 (5th Cir. 1979). Respondents submit that there is no conflict whatsoever between these two cases, but even if there was, a conflict between decisions of the same circuit is not a proper basis upon which to petition this Court for a Writ of Certiorari. Rather, a conflict within the same circuit should be a matter for rehearing or rehearing en banc in the Court of Appeals. Layfield did apply for rehearing en banc based upon the same contentions set forth in her Petition for Writ of Certiorari, and Rehearing and Rehearing En Banc were promptly denied.

In addition, her argument that the Fifth Circuit case of *Abbey vs. Columbus Dodge, Inc., supra,* conflicts with the Fifth Circuit's opinion in the case *sub judice* is not well founded. The Fifth Circuit decided the *Abbey* case, *supra,* not on the ground that a portion of the fee was remitted to the assignee of the retail installment contract, but on the ground that the "filing fee" charged in that case did not fall within one of the four classes of charges which may be individually excluded from the finance charge if properly disclosed by virtue of Regulation Z., § 226.4(b), 12 CFR 226.4(b). With respect to the case *sub judice,* under the authorty of *Meyers vs. Clearview Dodge Sales, Inc.*, 539 F. 2d 511 (5th Cir. 1976), the documentary fee involved in this case was properly disclosed as an "other charge," and the trial and appellate courts properly held that Layfield was not entitled to recover for that alleged Truth-in-Lending violation.

Neither is it correct, as Layfield asserts, that there is no evidence in the record that the entire documentary fee charged in this case was retained by the dealer, and that no portion of it

was paid to any other party. An affidavit atached to Bill Heard's Motion for Summary Judgment shows that the documentary fee is a fee charged for the preparation of title and license documents, delivering and picking up such documents from the Courthouse, and various other services in connection with such documents, and that no portion of the fee is paid to any governmental agency or official. Further, the affidavit showed that the fee was charged on both credit and noncredit sales, and is not imposed by the dealer as an incident to or as a condition of the extension of credit.

The Motion for Summary Judgment filed by GMAC included the affidavit of its branch manager. That affidavit shows that it was the understanding of GMAC that the entire documentary fee charged to the retail customer was retained by the dealer as compensation for the services rendered in connection with the preparation and filing of license and title documents and the maintenance of automobiles from the time that they come into the dealer's inventory until they are delivered to the retail customer.

From these two affidavits, it is clearly shown that Bill Heard did not pay any portion of the documentary fee to any governmental agency or official, and the only permissible conclusion is that it did not pay any portion of the fee to the assignee of the contract, GMAC. Since these were the only parties to whom a portion of the fee might be paid and there were no other creditors or parties involved, the only permissible conclusion is that the entire fee was retained by Bill Heard.

For the foregoing reasons, Respondents respectfully submit that the Fifth Circuit Court of Appeals correctly affirmed the judgment of the trial court granting Bill Heard's and GMAC's Motion for Summary Judgment with respect to Layfield's allegation of a Truth-in-Lending violation.

CONCLUSION

Layfield's Petition for Writ of Certiorari raises two points in support of her petition. First, Layfield asserts that the trial court abused its discretion in disallowing her belated amendment to her complaint, notwithstanding the fact that she failed to comply with the Federal Rules of Civil Producure, the local rules of court regarding motions, the grounds asserted for the motion were admittedly false, and that allowance of the amendments would have been prejudicial to Bill Heard and GMAC. Second, she asserts that summary judgment should not have been granted to Bill Heard and GMAC with respect to the alleged Truth-in-Lending claim regarding disclosure of the documentary fee, notwithstanding the fact that the documentary fee was disclosed in the precise manner dictated by the controlling precedent of *Meyers vs. Clearview Dodge Sales, Inc., supra*.. These issues were fully briefed and argued in the trial court and the Fifth Circuit Court of Appeals, with the result that eminently proper findings and judgments were entered in favor of Bill Heard and GMAC. It is submitted that a reargument of these same issues, which are hardly issues of grave public importance, should not be allowed, and Respondents therefore respectfully submit that Layfield's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD

By: _____

Jerry A. Buchanan
Attorneys for Respondent
Bill Heard Chevrolet Company
P. O. Box 2707
Columbus, Georgia 31902
404-324-0201

KELLY, DENNEY, PEASE & ALLISON

By: Ernest Kirk II
Ernest Kirk, II
Attorneys for Respondent
General Motors Acceptance Corporation

P. O. Box 2648
Columbus, Georgia 31902
404-324-3711

CERTIFICATE OF SERVICE

I do hereby certify that I have served Petitioner with three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari by mailing a copy of same, postage prepaid and properly addressed, to Mr. Ron S. Iddins, Attorney at Law, P. O. Box 503, Columbus, Georgia 31902.

This 23 day of April, 1980.

Ernest Kirk II
Ernest Kirk, II